



METROPOLITAN POLICE DEPARTMENT NASHVILLE, TENNESSEE

Roll Call Training

MNPD FORM 101
Rev. Feb. 2020

SUBJECT: Consent Searches	REVISED: N/A	RESCINDS: N/A
REFERENCE: Department Manual 5.20.020 Searches by Consent	EFFECTIVE DATE: August 16, 2021	DISTRIBUTION: C – All Personnel

I. PURPOSE

The purpose of this roll call training document is to instruct MNPD personnel on a change to MNPD policy provisions, pending formal update to the Manual, regarding consent searches.

This roll call training should be viewed in PowerDMS, under "Documents" and properly signed for, indicating receipt and acknowledgment of this training. Additionally, departmental roll call trainings may be accessed through the department's PDWeb site by clicking on the link for "Manual" and then "Roll Call Training – MNPD Manual Revisions".

II. KEY POINTS TO COVER DURING ROLL CALL TRAINING

MNPD Manual **5.20.020 Searches by Consent**, is deleted in its entirety and replaced with the following (*changes are highlighted*):

5.20.020 Searches by Consent

- A. Officers may conduct a search of a person or property by obtaining prior consent. The consent must be voluntarily given, and that voluntary consent must be shown to be unequivocal, specific, and intelligently given, uncontaminated by duress or coercion. The consent must be proven to be voluntarily given by a preponderance of the evidence and is never lightly inferred by the courts. The prior consent must be obtained from the person or persons with authority to give a valid consent. Consent need not be in writing and a refusal to give written consent may still permit a valid oral consent.
- B. Officers should make an informed evaluation of the relevant facts and circumstances of the situation; consider the scope of the particular intrusion, the manner in which it is conducted, and the time and place in which it is conducted when making a determination that it is reasonable to request consent.
- C. It is expected that officers will attempt to obtain written consent, using the proper departmental form, prior to conducting a consent search. If the individual indicates that they will consent to a search but are refusing to sign the form, employees shall complete the form and indicate "consented to search but refused to sign,"- inserting initials and the signature of any witness in the signature block.
- D. Current consent to search forms available for use are, MNPD Form 262 - Consent for a Search of Premises, MNPD Form 263 - Consent for Physical Samples, Fingerprints or Photographs, MNPD Form 264 - Consent to Search Electronic Devices or Media, and MNPD Form 265 - Consent to Search a Vehicle.

III. ADDITIONAL INFORMATION ON CONSENT SEARCHES

A Training Refresher

CONSENT SEARCH-PUTTING THE REASONABLENESS BACK INTO CONSENT

Potential for Abuse of Discretion

Consent searches inherently raise three serious civil rights and civil liberties concerns.

- First, due to the nature of the contact, people may not truly believe that they can deny consent or feel that to deny consent is admitting they have something to hide. Consent is often granted on an isolated roadside, late at night, in a one-on-one encounter with an armed law enforcement official. This setting could be perceived as coercive. Many civilians believe they must grant consent. Other civilians fear the consequences of refusing to grant consent, such as the issuance of extra traffic citations, or the delay caused by further interrogation or bringing a drug-sniffing dog to the scene.
- Second, once consent is granted, the search of one's car and/or person that follows is described by some as "intrusive" and "embarrassing".
- Third, because the decision whether to request consent to search can be based on the subjective "hunch" of individual police officers, consent searches are inherently susceptible to bias, conscious or otherwise. From a management perspective, consent searches are particularly difficult to subject to meaningful supervisory review.

Critical Thinking & Problem Oriented Policing Skills

Using principles of critical thinking and problem solving can help officers improve their effectiveness at using consent searches while minimizing harm to civil liberties. The theory behind problem oriented policing is that underlying conditions create problems. These conditions might include the characteristics of the people involved (offenders, potential victims, and others), the social setting in which these people interact, the physical environment, and the way the public deals with these conditions. How Critical Thinking and problem solving techniques can be used in consent search decision making...

- Observes details of the circumstances, gathers facts through Q&A, considers individual factors (time, location, history, etc.).
- Evaluates all the relevant facts considering the circumstances • Makes informed decisions based upon evaluation and professional training and judgment.
- Acts reasonably (requests consent) based upon informed evaluation and totality of circumstances. Applies a "reasonableness" evaluation to the facts and circumstances of the stop instead of relying on the "because I can" or "it never hurts to ask" approach.

Putting Reasonableness Back Into Consent

While bright-line rules bring clarity and predictability, standards like "reasonableness" are indeterminate and require case-by-case decision-making. To avoid increased scrutiny or the creation of such bright line rules-which may limit officers ability to conduct consent searches, it's increasingly important that officers apply a fact based reasonableness evaluation to the decision to request a consent search.

Considering that courts must always balance the government's needs against individual privacy rights, officers should "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted" in evaluating consent searches. In making this determination, courts will look to and officers should consider the following:

- The Reason for the Request
 - Many of the more troubling consequences of current consent doctrine can be attributed to the fact that police do not have to articulate any reason at all for requesting consent to search. As long as there is no limit to the ability of police to ask for consent, there is no limit to the overall number of consent searches police can seek.
 - Even some critics of the consent-search exception to the warrant requirement agree that it is reasonable for police to request consent when they have a reasonable suspicion that they will find something-some level of individual suspicion - the same standard as for "stop or frisk".
 - Applying this reasonableness evaluation to the reason for the request simply requires an officer to avoid the trap of "because I can" and requires an officer to consider the underlying facts and circumstances of the stop, the behavior or situational factors that lead an officer to believe that contraband may be found through a consent search. This does not rise to a probable cause determination, but simply ensures that 1) the consent must be voluntary, 2) the consent must be free of coercion, and 3) there was some reason, beyond a mere hunch or the legal ability to ask, to formally request consent.
 - Based upon this type of critical thinking and fact evaluation, can you articulate a reasonable basis to request consent?
- The Reasonableness of the Scope
 - The reasonableness of a request for consent to search should take into account not only the officer's reasons for asking for consent, but also the scope of the consent that is requested.
 - This evaluation simply requires that, after evaluating the reasonableness of requesting consent, that the officer consider the scope of the intended search-to the driver floor board, the glove box, the trunk. Essentially asking the question, based upon the reasonableness evaluation of the request-what do I expect to find and where may it be concealed?
 - This evaluation also involves a consideration of the potential for the perception of an adverse event-for the officer, the person being searched, or the public at large? Consider such factors as, location of the stop and search (public or private), is the search occurring in front of children, family or friends? Level of intrusiveness of the search balanced against what I expect to find?

Currently, consent could be seen as a "free-for-all," in which it "never hurts to ask." If, instead, police officers know they will have to articulate their reasons for asking for consent and the logic behind the scope of the search, then the resulting searches are more likely to be truly reasonable. Aligning consent-search doctrine with traditional concepts of Fourth Amendment reasonableness would drastically change the way that law enforcement is perceived and viewed by citizens and courts. If police officers know they will have to articulate their reasons for asking for consent and the logic behind the scope of the search, then the resulting searches are more likely to be truly reasonable, legal, and able to survive scrutiny by courts, media and others.

Documentation

Officers should, as with any activity, fully document their actions. This is significantly more important in discretionary activities such as consent searches or other warrantless searches.

- Document Factors Indicating Why Consent Was Requested-articulate and document the reasonableness evaluation of requesting consent and the ability of the person to understand the request.
- Obtain Written Consent Where Possible-use appropriate MNPD forms.
Follow MNPD policy.
- Document the Absence of Written Consent-why it was not obtained or unable to be obtained.
- Document Denial - documenting denials demonstrates the need for additional search options and also your compliance with established law.
- Follow MNPD Policy.
- Use Body Worn Cameras or In Car Cameras to document interactions, the consent request, the explanation of rights and the consent process.

Results of Increased Evaluation of Consent Search Activities

- Improved Public Cooperation & Trust
 - The police are considered the most visible face of our government-any unreasonable or unnecessary activity which diminishes that trust only serves to impair the future ability to serve the community at large.
 - Earning trust is an ongoing process-it cannot be demanded or expected. Any actions which diminishes that process creates community harm.
 - We earn trust and cooperation by demonstrating professionalism, engaging in lawful actions, and by holding ourselves accountable.
- Improved Credibility with the Public, Lawyers & Courts •
 - Less suppression hearings
 - Less negative verdicts
 - Less civil litigation
 - Less misconduct complaints
- Avoid Unnecessary Scrutiny
 - Media
 - Advocacy Groups
 - Courts, Lawyers, & DOJ

If you have any questions or need additional assistance, please contact:

**Legal Resources Division
615-862-7658**